

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200912003**

Release Date: 3/20/2009

Index Number: 851.02-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B02

PLR-130504-08

Date:

November 19, 2008

Legend

Fund =

Company =

Note 1 =

Note 2 =

Index 1 =

Index 2 =

Date 1 =

Date 2 =

Date 3 =

State =

Country =

a =

b =

c =

d =

e =

Dear :

This responds to your request dated June 26, 2008, and supplemental correspondence dated September 4, 2008, submitted by your authorized representative on behalf of Fund. Fund requests that the Internal Revenue Service rule: 1) that income and gain arising from the commodities-linked notes described in this letter will constitute qualifying income to Fund under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (the Code), and 2) that income earned from the ownership of a wholly-owned subsidiary that is a controlled foreign corporation (CFC) constitutes qualifying income to Fund under section 851(b)(2).

Facts

Company was established under the laws of State on Date 1. Company is registered as an open-end management investment company under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the 1940 Act). Fund is a fund of Company and uses the accrual method of accounting for a fiscal year beginning Date 2 and ending Date 3. Fund will elect to be taxed as a regulated investment company (RIC) under Subchapter M of the Code.

Commodities-linked Notes

Fund intends to invest in commodities-linked notes having the terms and conditions of the following notes (the Notes): The first Note (Note 1) will be issued to Fund at a par value of \$a. Its payout formula will be determined with reference to Index 1, a total return index. Its term will be three years. Fund, as holder of Note 1, will have the right to put Note 1 to the issuer at the calculated redemption price based on the closing value of Index 1 as of the end of the next business day after notification to the issuer. In addition, if Index 1 falls b percent from the beginning value of Index 1 at the time of the acquisition of Note 1, Note 1 will “knockout” and be automatically redeemed based on a redemption price calculated using the closing value of Index 1 of the same business day or the next business day.

The repayment obligation upon early redemption, knockout, or at maturity is calculated under a formula that provides for an amount equal to the face amount of Note 1 multiplied by a leveraged, adjusted change in the index value. Note 1 will use a leverage factor of d. The adjusted change in the index value is reached by taking the percentage of the increase or decrease of the beginning value of Index 1 compared to the ending value of Index 1 for the applicable period and subtracting the Treasury Bill

Return expressed as a percentage and the issuer fee amount expressed as a percentage. In addition to the amount received under the formula, a payout upon redemption, knockout, or at maturity will include a coupon payment of e.

The second Note (Note 2) will be issued to the Fund at a par value of \$a. Its payout formula will be determined with reference to Index 2, a total return index. Its term will be thirteen months. Fund, as holder of the Note, will have the right to put Note 2 to the issuer at the calculated redemption price based on the closing value of Index 2 as of the end of the next business day after notification to the issuer. In addition, if Index 2 falls c percent from the beginning value of Index 2 at acquisition, Note 2 will “knockout” and be automatically redeemed based on a redemption price calculated using the closing value of the same business day or the next business day.

The repayment obligation upon early redemption, knockout, or at maturity is calculated under a formula that provides for an amount equal to the face amount of Note 2 multiplied by an adjusted change in the index value. The adjusted change in the index value is reached by taking the percentage of the increase or decrease of the beginning value of Index 2 compared to the ending value of Index 2 for the applicable period and subtracting from that amount the Treasury Bill Return expressed as a percentage and the issuer fee amount expressed as a percentage. In addition to the amount received under the formula, a payout upon redemption, knockout, or at maturity will include a coupon payment of e.

Fund makes the following representations with respect to these Notes:

(1) The issuer of a note will receive payment in full of the purchase price of the note substantially contemporaneously with the delivery of the note;

(2) The Fund while holding a note will not be required to make any payment to the issuer of the note in addition to the purchase price paid for the note, whether as margin, settlement payment, or otherwise, during the life of the note or at maturity.

(3) The issuer of a note is not subject by the terms of the instrument to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C. 2, as amended (CEA); and

(4) The notes will not be marketed as contracts of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Controlled Foreign Corporation

Fund intends to form a wholly-owned subsidiary (Subsidiary). Subsidiary will be incorporated as an exempted limited company under the laws of Country. Under the laws of Country, an exempted limited company provides for limited liability for all holders

of shares. A shareholder's liability is limited to the amount, if any, unpaid with respect to the shares acquired by the shareholder. Subsidiary will file an election on Form 8832 to be taxed as a corporation pursuant to § 301.7701-3 of the Procedure and Administration regulations.

Fund represents that, although Subsidiary will not be registered as an investment company under the 1940 Act, Subsidiary will comply with the requirements of section 18(f) of the 1940 Act, Investment Company Act Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to investments that would apply if the Subsidiary were registered under the 1940 Act.

Fund may invest a portion of its assets in the Subsidiary, subject to the diversification limitations set forth in section 851(b)(3) of the Code. Subsidiary will invest primarily in one or more of the following types of instruments: financial futures, options contracts, deliverable forward contracts, and cash settled non-deliverable forward contracts. Each of these contracts may be linked to the performance of one or multiple commodities (including a commodity index). Subsidiary may also invest in swaps on commodities, commodities indexes, or commodities linked notes, including exchange-traded notes. Further, Subsidiary may also invest directly in commodities. Finally, Subsidiary may invest in exchange-traded funds whose performance is based on one or more commodities or commodities indexes.

Subsidiary will be wholly owned by the Fund and, as such, Fund represents that the Subsidiary will be classified as a controlled foreign corporation. Fund will include its "Subpart F" income attributable to its subsidiary under the rules applicable to CFCs under the Code.

Law and Analysis

Section 851(b)(2) of the Code provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test (the Qualifying Income Requirement). Under this test, at least 90 percent of its gross income must be derived from certain enumerated sources. Section 851(b)(2) defines qualifying income, in relevant part, as –

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to [the RIC's] business of investing in such stock, securities, or currencies

Section 2(a)(36) of the 1940 Act defines the term "security" as –

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(f)(1) of the CEA provides that the CEA is not applicable to a hybrid instrument that is predominantly a security. Section 2(f)(2) of the CEA provides that a hybrid instrument shall be considered to be predominantly a security if –

(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with the delivery of the hybrid instrument;

(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Section 2(f)(3) of the CEA provides, in part, that for purposes of section 2(f)(2)(C) of the CEA, mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

In addition, section 851(b) of the Code provides that, for purposes of section 851(b)(2), there shall be treated as dividends amounts included in gross income under section 951(a)(1)(A)(i) or 1293(a) for the taxable year to the extent that, under section

959(a)(1) or 1293(c) (as the case may be), there is a distribution out of the earnings and profits of the taxable year which are attributable to the amounts so included.

Section 957 of the Code defines a controlled foreign corporation (CFC) as any foreign corporation in which more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote, or (2) the total value of the stock is owned by United States shareholders on any day during the corporation's taxable year. A United States shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total voting power of a foreign corporation. Fund will own 100 percent of the voting power of the stock of Subsidiary. Fund is a United States person. Subsidiary therefore will qualify as a CFC under these provisions.

Section 951(a)(1) of the Code provides that, if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during any taxable year, every person who is a United States shareholder of this corporation and who owns stock in this corporation on the last day of the taxable year in which the corporation is a CFC shall include in gross income the sum of the shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952 of the Code defines subpart F income to include foreign base company income determined under section 954. Under section 954(a)(1), foreign base company income includes foreign personal holding company income determined under section 954(c). Section 954(c)(1)(A) defines foreign personal holding company income to include dividends, interest, royalties, rents, and annuities.

Subsidiary's investments may generate foreign personal holding company income under section 954(c)(1)(A), which is subpart F income. Fund would therefore include in income Subsidiary's subpart F income for the taxable year in accordance with section 951.

Conclusion

Based on the facts as represented, we rule that income and gain arising from the Notes constitutes qualifying income to Fund under section 851(b)(2) of the Code. We further rule that subpart F income attributed to the Fund due to its investments in Subsidiary is income derived with respect to Fund's business of investing in the stock of Subsidiary and thus constitutes qualifying income to Fund under section 851(b)(2).

This ruling is directed only to the taxpayer who requested it, and is limited to the facts as represented by the taxpayer. Section 6110(k)(3) provides that this letter may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Thomas M. Preston
Senior Counsel, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: